

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of AT&T Inc. for Interim)	
Declaratory Ruling and Limited Waivers)	WC Docket No. 08-152
Regarding Access Charges and the "ESP)	
Exemption")	
_____)	

**COMMENTS OF BROADVIEW NETWORKS, NUVOX,
ONE COMMUNICATIONS CORP., AND XO COMMUNICATIONS, LLC**

Broadview Networks, NuVox, One Communications Corp., and XO

Communications, LLC (hereinafter referred to as "Joint Commenters"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("Commission") on August 13, 2008,¹ hereby provide their reply to comments submitted in response to the Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers filed July 17, 2008 in WC Docket No. 08-152.²

I. INTRODUCTION AND SUMMARY

As discussed herein, the Joint Commenters endorse the comments of those who called for denial of AT&T's Petition on the basis of its myriad procedural and substantive shortcomings. The Joint Commenters urge the Commission to reject AT&T's self-serving

¹ *Wireline Competition Bureau Grants Extension of Time to File Comments on AT&T's Petition for an Interim Declaratory Ruling and Limited Waivers*, WC Docket No. 08-152, Public Notice (rel. Aug. 13, 2008).

² *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers regarding Access Charges and the "ESP Exemption,"* WC Docket No. 08-152 (filed Jul. 17, 2008) ("AT&T Petition" or "Petition").

attempt to effectuate its own “quick fix” for certain problems that it claims arise from the current intercarrier compensation system at the expense of consumers and competitive carriers.

Coincident with its Petition, AT&T submitted a letter urging the Commission to immediately undertake comprehensive intercarrier compensation reform.³ The letter characterizes the current intercarrier compensation system as in need of a comprehensive overhaul.⁴ In AT&T’s view, comprehensive reform should take the form of the Missoula Plan, but in any event “should use the core element of that Plan – unifying terminating intercarrier compensation regimes and charges – as its goal.”⁵

No doubt recognizing that adoption of comprehensive reform by the Commission in the immediate future is uncertain at best, however, AT&T proposes a series of immediate actions to address what it characterizes as “the most pressing problems plaguing the existing regime.”⁶ The most important (and far-reaching) immediate action proposed by AT&T is the subject of its Petition, *i.e.*, establishing “the appropriate regulatory treatment of VoIP traffic” for purposes of intercarrier compensation.⁷ The Petition seeks a Commission declaration on an interim basis that interstate terminating access charges apply to interstate interexchange IP-to-PSTN and PSTN-to-IP traffic, and that intrastate terminating access charges apply to intrastate

³ Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket Nos. 01-92, 96-45, WC Docket Nos. 05-337, 99-68, 07-135 (Jul. 17, 2008) (“*Comprehensive Reform Letter*”).

⁴ *Comprehensive Reform Letter*, at 1. AT&T also filed a letter urging the Commission to rule that VoIP services provided by all providers are subject to exclusive federal jurisdiction except with respect to intrastate universal service and Telecommunications Relay Services (“TRS”) obligations. *See* Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Kevin Martin, Chairman, Federal Communications Commission, WC Docket Nos. 04-36, 06-122, CC Docket No. 96-45 (Jul. 17, 2008) (“*VoIP Preemption Letter*”).

⁵ *Comprehensive Reform Letter*, at 2.

⁶ *Id.*, at 7.

⁷ *Id.*, at 8. VoIP traffic is defined as “calls that take the form of VoIP on one end and ordinary PSTN traffic on the other.” *Id.*

IP-to-PSTN and PSTN-to-IP traffic where the LEC's intrastate terminating per-minute access rates are equal to or less than its terminating interstate per-minute access rates.⁸ In addition, AT&T seeks waivers to permit it the flexibility to increase its interstate Subscriber Line Charges ("SLCs") and the originating switched access component of its interstate Average Traffic Sensitive ("ATS") rate where it reduces intrastate terminating access rates to interstate levels in order to be eligible to assess access charges to IP-to-PSTN and PSTN-to-IP traffic.⁹

II. AT&T'S ATTEMPT TO USE AN INTERIM DECLARATORY RULING AND WAIVERS TO APPLY ACCESS CHARGES TO INTERNET PROTOCOL TRAFFIC IS INAPPROPRIATE

As discussed below, the Joint Commenters agree with the numerous interested parties who explained in their comments that the vehicle chosen by AT&T to present the question of the appropriate compensation (if any) that applies when traffic that originates in the Internet Protocol is terminated to a party served by the Public Switched Telephone Network ("PSTN") and, conversely, when PSTN-originated traffic is terminated to a party served by an IP-based network is inappropriate and discriminatory. Further, the Joint Commenters agree that the issues raised by AT&T's Petition, which "are of great public importance"¹⁰ and wide-ranging

⁸ Petition, at 5. The Petition also seeks to have reciprocal compensation arrangements apply to the transport and termination of IP-to-PSTN traffic that is local.

⁹ *Id.*, at 8. AT&T also suggests in its *Comprehensive Reform Letter* that the Commission immediately (1) complete action on the D.C. Circuit's remand of the *ISP-Bound Traffic Order* by adopting an alternative legal theory to maintain its current rules; (2) adopt rule changes to address traffic pumping; (3) declare that asymmetrical compensation for IP-to-PSTN and PSTN-to-IP traffic is unjust and unreasonable; (4) take action to cure IP-in-the-middle access arbitrage; (5) declare that designating an interconnection point with a centralized equal access provider that is distant from the local exchange carrier's ("LEC's") actual interconnection point to be an unjust and unreasonable practice; and (6) adopt the USTelecom proposal for addressing phantom traffic. The only topic on which comment is sought in the Public Notice is the action purposed in AT&T's Petition relating to the application of access charges to IP-PSTN traffic.

¹⁰ Comments of the New Jersey Division of Rate Counsel, WC Docket No. 08-152 (filed Aug. 21, 2008), at 6.

impact, should be addressed in the context of a rulemaking proceeding where meaningful comment by all stakeholders can be effectuated.¹¹ There are at least two relevant rulemaking proceedings pending at the Commission.¹²

A. AT&T's Request For An Interim Ruling To Apply Access Charges To Internet Protocol Traffic Is Not Proper

AT&T asks the Commission to adopt “interim” relief in the form of a declaratory ruling that terminating switched access charges apply to IP-based traffic “pending more comprehensive reform.”¹³ Yet, as explained by COMPTTEL, “granting AT&T’s request for interim relief will only delay the ultimate resolution of the Commission’s long pending proceeding to implement comprehensive intercarrier compensation reform.”¹⁴ The Washington Utilities and Transportation Commission (“WUTC”) and others rightfully noted that the Commission should be focused on developing a comprehensive intercarrier compensation framework and that consideration of AT&T’s proposal “risks shifting attention and resource

¹¹ See *id.*, at 8. See also Comments of COMPTTEL, WC Docket No. 08-152 (filed Aug. 21, 2008), at 2; Letter from Sharon E. Gillett, Commissioner, Massachusetts Department of Telecommunications and Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 08-152 (Aug. 21, 2008) (“MDTC Comments”), at 3.

¹² See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (“*Intercarrier NPRM*”); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (“*IP-Enabled Services NPRM*”).

¹³ Petition, at 12. In addition, AT&T requests that the Commission waive the ESP Exemption “to the extent the Commission disagrees with AT&T ... and finds that the ESP Exemption currently applies to IP/PSTN traffic today.” *Id.*, at 6. AT&T also requests waiver of the Commission’s rules to permit it to adjust its federal SLCs and interstate originating access charges to offset foregone intrastate access charge revenues. *Id.*, at 8. The Joint Commenters oppose AT&T’s waiver requests for the same reasons we oppose AT&T’s request for a declaratory ruling.

¹⁴ COMPTTEL Comments, at 4.

from the longstanding need to move forward on all aspects of the compensation issue.”¹⁵ As succinctly stated by Comcast Corporation: “The AT&T Petition is precisely the type of ‘interim’ measure that the Commission should reject.”¹⁶

AT&T apparently agrees. In comments on Embarq’s petition for interim intercarrier compensation relief, AT&T stated that “[a]ttempting to address a few of the symptoms of today’s broken intercarrier compensation regime, as described in Embarq’s petition and AT&T’s July 17, 2008 letter setting forth a blueprint for achievable comprehensive reform, is inefficient.”¹⁷

Moreover, there is no need for an “interim” ruling, as the issue has been ripe for decision for years. As noted by AT&T, “[a]lthough this Commission has repeatedly proclaimed that it would resolve the issue of the appropriate compensation for IP/PSTN traffic, no such resolution has been forthcoming in more than a decade.”¹⁸

In 1998, the Commission issued a Report to Congress on Universal Service in which the Commission for the first time engaged in a tentative and preliminary discussion whether certain types of IP-enabled applications, specifically, IP-voice telephony, could be categorized “telecommunications” or “telecommunications services” under the Communications Act or whether these fell outside those categories.¹⁹ The *Report to Congress* also tentatively entertained whether any providers of IP telephony should be subject to access charges. The

¹⁵ Comments of the Washington Utilities and Transportation Commission, WC Docket No. 08-152 (filed Aug. 21, 2008) (“WUTC Comments”), at 3. *See also* COMPTEL Comments, at 8.

¹⁶ Comments of Comcast Corporation, WC Docket No. 08-152 (filed Aug. 21, 2008) (“Comcast Comments”), at 4.

¹⁷ Comments of AT&T Inc., WC Docket No. 08-160 (filed Aug. 26, 2008), at 2 (footnote omitted).

¹⁸ *Id.*, at 19 (footnote omitted).

¹⁹ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, (1988) (“*Report to Congress*”).

Commission reached no definitive conclusions regarding the regulatory classifications of any type of IP-based telephony (or the applicability of access charges to those services).

Since it issued its *Report to Congress*, the Commission has conducted a comprehensive rulemaking to examine myriad aspects of IP-enabled services, including VoIP (*i.e.*, IP-PSTN traffic). “[T]he extent to which access charges should apply to VoIP or other IP-enabled services”²⁰ was among the subjects specifically outlined in the March 2004 Notice of Proposed Rulemaking (“NPRM”) in that docket, although the Commission specified that in requesting comment on that issue it “[was] not addressing whether access charges apply or do not apply under existing law.”²¹ In the NPRM, the Commission stated its view that “[a]s a policy matter, ... any service provider that sends traffic to the PSTN *should* be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.”²² To that end, the Commission specifically sought comment on the authority it could rely on to require payment for these services, as well as whether the charges should be the same as the access charges assessed on providers of telecommunications services or should be computed and assessed differently.²³ In response, the Commission was presented with detailed input from all segments of the industry. To date, the record contains over 1,500 submissions.

That rulemaking is still pending, as is further development of the Commission’s treatment of IP-based services for intercarrier compensation purposes in the context of the

²⁰ *IP-Enabled Services NPRM*, ¶ 61.

²¹ *Id.*, at ¶ 32.

²² *Id.* (emphasis supplied).

²³ *Id.*

Commission's *Unified Intercarrier Compensation* rulemaking.²⁴ Interested parties have repeatedly presented the Commission with their views on the compensation obligations that should apply to IP-PSTN traffic in the context of those dockets as well as in a host of other proceedings over the past several years.²⁵ In short, this issue has been fully and completely debated. The Commission does not require additional input to make a reasoned decision and potential stakeholders do not require additional time or opportunity to present their views to the Commission. Consequently, there is no justification for the Commission to render an interim decision rather than establishing a permanent rule.²⁶ Moreover, there is no need for the Commission to adopt interim measures to address the treatment of Internet Protocol traffic in order to comply with a judicially-imposed deadline. The only issue the Commission must address by November 5, 2008 to respond to the D.C. Circuit's ruling in *Core Communications, Inc.* involves the legal basis for its ISP-bound traffic compensation rules.²⁷

²⁴ *Intercarrier NPRM*. In commencing that rulemaking, the Commission reiterated that, under current Commission policies and practice, "IP telephony [is] generally exempt from access charges . . ." *Id.*, at 9613.

²⁵ See, e.g., *FEATURE GROUP IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c), from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1), and Rule 69.5(b)*, WC Docket No. 07-256; *Petition of the EMBARQ LOCAL OPERATING COMPANIES for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and the Commission Order on the ESP Exemption*, WC Docket No. 08-8; *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, Order (Apr. 21, 2004); *AT&T Corp., Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, 20 FCC Rcd. 4826 (2005); *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, DA 06-1510 (rel. Jul. 25, 2006).

²⁶ Moreover, as pointed out by COMPTTEL, in some cases interim decisions become permanent by default because the Commission fails to take additional action. See Comments of COMPTTEL, at 10 ("History has shown that interim fixes often remain in place long past their expiration dates."). There is a significant danger that could occur here and the industry and the public deserve for the Commission to be direct and definitive regarding this important issue rather than for it to "back into" a permanent decision in the guise of an interim ruling.

²⁷ See *In re Core Communications, Inc.*, No. 07-1446, 2008 WL 2649636 (D.C. Cir. Jul. 8, 2008).

B. The Issues Raised In AT&T's Petition Should Be Addressed In A Comprehensive Manner Through A Rulemaking Proceeding

Numerous commenters objected to AT&T's attempt to use the declaratory ruling process to resolve for itself "complex, multidimensional issues that affect the entire industry."²⁸ The Massachusetts Department of Telecommunications and Cable ("MDTC") reflected the views of many interested parties in stating that "besides the issues to be resolved by the Petition (e.g., access charges for IP/PSTN traffic), the Petition also implicates many other issues which have wide-ranging ramifications for the industry and state and federal regulators, and which are better addressed through the rulemaking process."²⁹ The MDTC went on to note that "the Intercarrier Compensation FNPRM already exists to address these issues."³⁰

The declaratory ruling process is ill-suited to resolve complex, interrelated, industry-wide policy issues such as those raised by AT&T's Petition. Importantly, as pointed out by Pac-West Telecomm, Inc. ("Pac-West"), a carrier-specific declaratory ruling does not afford the Commission the opportunity to craft an outcome that takes into account the potential ramifications of its action on *all* stakeholders. Pac-West noted that AT&T "only proposes to plug those holes that it thinks are flooding its own house. It pays no attention to significant problems the existing system causes CLECs like Pac-West and entirely ignores those components of the present system which provide it with massive economic benefits."³¹ Tw telecom inc. ("TWTC") agreed, calling AT&T's Petition "a narrowly tailored request for

²⁸ MDTC Comments, at 2.

²⁹ *Id.*

³⁰ *Id.* (footnote omitted).

³¹ Comments of Pac-West Telecomm, Inc., WC Docket No. 08-152 (filed Aug. 21, 2008) ("Pac-West Comments"), at 3.

changes to existing rules needed to address AT&T's particular business concerns.”³²

USTelecom echoed the concerns expressed by others, noting that “[w]hile each petition suggests solutions tailored to the particular circumstances of the filing company, those solutions may be inappropriate when applied to other companies that are not similarly situated.”³³

Moreover, as pointed out by Cox Communications, Inc. (“Cox”), AT&T’s Petition effectively prejudices for the entire industry a key issue in the comprehensive intercarrier compensation reform docket, *i.e.*, “whether changes in intercarrier compensation must be revenue neutral.”³⁴ Cox notes that while granting AT&T revenue neutrality “would not technically prevent the Commission from reaching a different conclusion in the intercarrier compensation proceeding, in practice a decision that ensures revenue neutrality for such a large carrier would be nearly impossible to overturn any time soon.”³⁵

The overwhelming majority of commenting parties – regardless of their views on the form intercarrier compensation reform should take – agreed that the Commission should focus its attention on crafting a comprehensive approach to intercarrier compensation matters. In the words of Verizon, “the Commission should not address AT&T’s or Embarq’s petition, which focus on a particular type of traffic for only one carrier, at this time.”³⁶ Others added that

³² Comments of tw telecom inc., WC Docket No. 08-152 (filed Aug. 21, 2008) (“TWTC Comments”), at 2.

³³ Comments of the United States Telecom Association, WC Docket No. 08-152 (filed Aug. 21, 2008) (“USTelecom Comments”), at 2. Indeed, Windstream Communications, Inc. noted that AT&T’s Petition “altogether fail[s] to address the problems faced by mid-sized and small carriers and the rural, high-cost regions they serve. Comments of Windstream Communications, Inc., WC Docket No. 08-152 (filed Aug. 21, 2008) (“Windstream Comments”), at 4.

³⁴ Comments of Cox Communications, Inc., WC Docket No. 08-152 (filed Aug. 21, 2008) (“Cox Comments”), at 7.

³⁵ *Id.*

³⁶ Comments of Verizon, WC Docket No. 08-152 (filed Aug. 21, 2008) (“Verizon Comments”), at 1-2 (emphasis in original).

addressing intercarrier compensation issues in a piecemeal manner – as requested by AT&T’s Petition – would only “divert resources from the ultimate goal”³⁷ and “delay further efforts to address comprehensive reform to the current compensation scheme.”³⁸ In short, the comments expressed little support for the *ad hoc* carrier-specific approach to intercarrier compensation matters suggested by AT&T’s Petition.

C. AT&T Has Not Made A Sufficient Showing To Justify The Relief Requested In Its Petition

The Joint Commenters agree with the assessment of COMPTTEL and others that at bottom, AT&T’s Petition is not directed at effectuating real intercarrier compensation reform but “is merely another attempt to ensure that any rate adjustment it undertakes, even on a voluntary basis, has a revenue-neutral impact.”³⁹ As noted by NASUCA, however, “[n]o law or public policy compels a guarantee that the ILECs will retain or recoup those revenues” lost to access charge reductions.⁴⁰ Stated more generally, ILECs “do not have a ‘right’ to recover intercarrier revenues that are lost due to intercarrier compensation reform.”⁴¹ This is particularly true where – as here – the ILEC proposes to undertake *voluntary* decreases in intrastate terminating access charges.

Moreover, AT&T has failed to provide any analysis of the potential impact of the relief it seeks on other carriers. The WUTC raised this issue, pointing out that the Petition “lacks

³⁷ Pac-West Comments, at 3.

³⁸ WUTC Comments, at 3.

³⁹ COMPTTEL Comments, at 3. *See also* PAC-West Comments, at 8 (“It is highly likely that AT&T’s enthusiasm for reduced terminating rates would be severely dampened if it was not accompanied by Commission authorization to be made whole on the originating side.”); Comments of TEXALTEL, WC Docket No. 08-152 (filed Aug. 21, 2008) (“TEXALTEL Comments”), at 2-3.

⁴⁰ Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 08-152 (filed Aug. 21, 2008) (“NASUCA Comments”), at 8-9.

⁴¹ TWTC Comments, at 3.

sufficient supporting information to determine its effect, if granted, on intrastate access charge rates and intrastate revenues of those carriers operating in states like Washington where significant disparities exist between interstate and intrastate rates.”⁴² Cox explained further that many states cap competitive carriers’ intrastate access rates at the level charged by the ILEC and in those states any reduction by AT&T of its intrastate access rates would require a corresponding reduction by competitive carriers. However, while AT&T would be able to recover lost intrastate access revenues through increased interstate SLCs, a competitive carrier may not be able to raise its own SLCs “because it lacks the market power enjoyed by AT&T.”⁴³ Thus, the revenue neutrality enjoyed by AT&T would not be available to its competitors.

It also bears noting that while AT&T represents that its Petition is voluntary, it is only voluntary as to AT&T. It is not voluntary for those competitive carriers who would be forced to decrease their intrastate access rates should AT&T choose to do so. In reality, AT&T could force intrastate access charge reductions on its competitors and, as stated by Cox, “[t]here is no basis for the Commission to permit AT&T to impose reductions on other carriers, and for that reason alone AT&T’s proposal should be rejected.”⁴⁴

D. AT&T’s Proposal Would Permit It To Engage In Unreasonable Discrimination

AT&T’s Petition also should be denied because the relief requested would permit AT&T to engage in unreasonable discrimination by targeting recovery of foregone intrastate access revenues from end users in product and geographic markets in which it does not face competition.⁴⁵ AT&T would be free to set its SLCs for primary residential/single line business

⁴² WUTC Comments, at 3.

⁴³ Cox Comments, at 6.

⁴⁴ *Id.*

⁴⁵ *See* TWTC Comments, at 9-12.

and non-primary residential lines at the level of the cap in all geographic markets as a way of subsidizing lower multi-line SLCs in denser geographic areas. Such cost shifting would result in residential customers and small businesses subsidizing AT&T's services in more competitive markets, an outcome that should not be countenanced by the Commission.

Moreover, AT&T's competitors in the business market would be unable to engage in the same cost shifting because they operate in product and geographic markets that are typically subject to greater competition. "Therefore, under AT&T's plan, CLECs would be placed at a substantial competitive disadvantage" relative to AT&T.⁴⁶ At a minimum, should the Commission grant AT&T's Petition, which it should not, it should protect against the anti-competitive consequences outlined above by ensuring that AT&T recovers lost intrastate access revenues through SLC increases by customer class in proportion to the extent that access charge revenues are lost by that customer class.⁴⁷

⁴⁶ *Id.*, at 10.

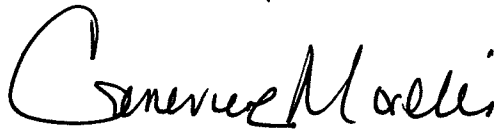
⁴⁷ *See id.*, at 11.

III. CONCLUSION

For all of the foregoing reasons, the Commission should heed AT&T's request that it "put aside carrier-specific requests for incremental reform"⁴⁸ and deny AT&T's Petition for Interim Declaratory Ruling and Limited Waivers.

Respectfully submitted,

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⁴⁸ Comments of AT&T Inc., WC Docket No. 08-160 (filed Aug. 26, 2008), at 4.

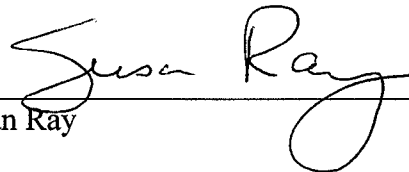
CERTIFICATE OF SERVICE

I, Susan Ray, hereby certify on this 2nd day of September, 2008, that copies of the foregoing Reply Comments were served via first-class mail, postage-prepaid, to the following:

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A handwritten signature in cursive script, reading "Susan Ray", is written over a horizontal line. The signature is fluid and stylized, with the first and last letters of each name being capitalized and prominent.